PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security

Bureau of Citizenship Services and Immigration Services

B6

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass. 3/F
Washington, D.C. 20536

[redacted]

File: WAC 01 284 50821 Office: California Service Center Date: MAY 28 2003

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: [redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a landscaping company. It seeks to employ the beneficiary permanently in the United States as a landscape gardener. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a brief.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the date the request for labor certification was accepted for

processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the request for labor certification was accepted for processing on January 31, 1997. The proffered salary as stated on the labor certification is $10.42 per hour which equals $21,673.60 annually.

With the petition, counsel submitted a letter from the petitioner's chief financial officer stating that the petitioner employs approximately 300 employees and has the ability to pay the proffered wage.

On February 5, 2002, the California Service Center issued a Request for Evidence in this matter. The Service Center requested that the petitioner provide signed, certified copies of its income tax returns for 1998, 1999, and 2000.

In response, counsel submitted a letter from the petitioner's president, dated April 17, 2002. The letter stated that the petitioner had then been in business for nine years, had shown significant profits each year, had adequate cash reserves and well-established customer relationships, and employed the beneficiary at that time.

On May 23, 2002, the Director, California Service Center issued a Notice of Intent to Deny in this matter. The director noted that the petitioner had failed to provide requested additional evidence of its ability to pay the proffered wage. The director stated that any response to the notice should include copies of the petitioner's signed and certified federal income tax returns for 1998 through 2001 and Form W-2 wage and tax statements showing the wages paid to the beneficiary during those same years.

In response, counsel submitted a letter, dated June 20, 2002. In that letter, counsel asserted that the petitioner had submitted sufficient evidence of its ability to pay the proffered wage and that the director's request for additional evidence was inappropriate.

On June 12, 2002, the Director, California Service Center, denied the petition. The director noted that accepting the statement of the CFO that the petitioner employs more than 100 people and has the ability to pay the proffered wage is optional according to the language of 8 C.F.R. § 204.5(g)(2). The director declared that the statement would not be accepted in this matter as no reason existed for the petitioner to decline to provide its tax returns.

On appeal, counsel noted that an officer of the petitioning

corporation has provided a statement that the petitioner employs more than 100 people and is able to pay the proffered wage. Counsel again urges that, according to 8 C.F.R. § 204.5(g)(2), the statement provided is sufficient to demonstrate the petitioner's ability to pay the proffered wage. With the appeal brief, counsel provided a printout purporting to show that the beneficiary was employed by the petitioner from March 1997 to May 2001, though at a pay scale below the proffered wage in this case.

The director's decision emphasizes that, according to 8 C.F.R. § 204.5(g)(2) he may accept the statement of the petitioner's CFO as sufficient evidence of the petitioner's ability to pay the proffered wage, but that he is not obliged to accept it as such. The director also noted that, in an appropriate case, he may require additional evidence of the ability to pay, and that the petitioner has offered no reason for declining to provide the requested evidence.

However, the record contains no reason to disbelieve the statement made by the petitioner's CFO, nor any indication that this was an appropriate case in which to require additional evidence. Under these circumstances, with no enunciated reason to require additional evidence of the ability to pay, this office finds that the director should have accepted the statement of the CFO as sufficient evidence of the petitioner's continuing ability to pay the wage of the beneficiary.

The evidence submitted demonstrates that the petitioner has had the continuing ability to pay the proffered wage beginning on the priority date. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained.